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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.C. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

T.J. et al.,

Defendants and Appellants.

E046590

(Super.Ct.No. RIJ113809)

OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge.

Affirmed.

Karen J. Dodds, under appointment by the Court of Appeal, for Defendant and
Appellant T.J.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and
Appellant C.C.

Pamela J. Walls, Interim County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Minors.

Mother appeals from a judgment terminating her parental rights to S.C., age four, and J.C., age three. (Welf. & Inst. Code,¹ § 366.26.) She argues that the juvenile court employed the wrong legal standard in determining there was no beneficial parent-child relationship, and that there is insufficient evidence to support the lower court's finding the exception did not apply. Father joins mother's argument, presenting no separate issues. We affirm.

BACKGROUND

On February 4, 2007, S.C., age three, and J.C., age two, were taken into temporary custody following a domestic violence incident involving their parents. The mother and father argued over father's drug use the previous day, and father attempted to take the younger child away in his car without a car seat. Mother tried to remove the child from the car, leaving the car door open, unaware that S.C. had exited the house and was standing between the driver's side door and a parked vehicle. As father put the car into reverse to back out, S.C. was pinned between the open door and the parked vehicle. Father sped away. S.C. sustained a collapsed lung.

The Department of Public Social Services (DPSS) filed a dependency petition on behalf of the two children alleging serious physical harm (as to S.C.) and risk of such

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

harm being inflicted nonaccidentally as to both children (§ 300, subd. (a)), neglect (both children) as a result of failure to supervise or protect and inability to provide regular care due to both parents' drug use (§ 300, subd. (b)), severe physical abuse to a child under five (as to S.C.; § 300, subd. (e)), and risk to J.C. as a result of the abuse or neglect of his sibling, S.C. (§ 300, subd. (j).)

On March 6, 2007, the court held the jurisdiction hearing, at which the parents submitted the matter on the basis of the social worker's reports. The allegations of the petition were found to be true and the children were removed from the custody of both parents, who were ordered to participate in reunification services. On October 15, 2007, at the six-month status review, the children were returned to mother's custody under a family maintenance plan. As to father, reunification services were terminated. Felony charges were pending against father at that time.

On February 1, 2008, four months after the children were returned to mother's custody, they were re-detained. A supplemental petition (§ 387) was filed alleging that the prior disposition had been ineffective in the protection of the children or the rehabilitation of the mother. This action resulted from mother's arrest on February 1, 2008, on charges of selling controlled substances, and child endangerment. The charges arose from her participation in drug transactions with a confidential informant, under police surveillance, while her children were present.

On April 15, 2008, mother submitted on the reports at the jurisdictional hearing as to the supplemental petition. The court found the allegations of the supplemental petition to be true, removed the children from mother's custody, and denied further services to

mother. The court set a hearing to select and implement a permanent plan, pursuant to section 366.26.

By May 29, 2008, the children were placed in the home of their paternal grandmother, who was interested in adopting them. The selection and implementation hearing was held on August 25, 2008. At the hearing, father informed the court he was serving a prison sentence and would not be released until 2010. Mother argued that she had maintained regular visitation and contact and that maintaining the parent-child relationship would be beneficial. The court found the exception to adoption based on the beneficial parent-child relationship was inapplicable. The court terminated the parental rights of both parents. Both parents appeal.

DISCUSSION

1. **The Court Did Not Apply the Wrong Legal Test to Determine Whether the Beneficial Parent-Child Relationship Exception to Adoptability Applied.**

Mother argues the juvenile court applied the wrong legal test in determining that the beneficial parent-child relationship exception to termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i).) She asserts the trial court found the exception did not apply because the mother did not establish day-to-day contact. We disagree.

Section 366.26, subdivision (c)(1), provides that if the court determines, based on the [adoption] assessment and any other relevant evidence, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption, unless one of several statutory exceptions applies. One such exception applies

when the court finds a compelling reason for determining that termination would be detrimental to the child because the parents have maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)

In *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, the reviewing court held that the exception created by the predecessor to the current section 366.26, subdivision (c)(1)(B)(i) applied only when the relationship with a natural parent promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. Subsequently, the reviewing court in *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419, agreed with *Autumn H.*, and added that a parent's "frequent and loving contact" with the child was not enough to sustain a finding that the exception would apply, when the parents "had not occupied a parental role in relation to them at any time during their lives."

The "parental role" language has spawned many decisions from appeals where parents argued that the holdings of *Autumn H.* and *Beatrice M.* placed the bar too high. However, decisional law continues to evolve. It is now accepted that a strong and beneficial parent-child relationship might exist despite a lack of day-to-day contact and interaction. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

In fact, several decisions have acknowledged it is unreasonable to require the parent of a child who has been removed from parental custody to prove that the child has a "primary attachment" to the parent, or to show the parent and the child have maintained day-to-day contact. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299.) As the court observed

in *S.B.*, if that were the standard, the rule would swallow the exception. (*Ibid.*) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through consistent contact and visitation. (*Id.* at pp. 300-301.)

Contrary to mother's assertion, the trial court did not find that the exception was inapplicable based on the lack of day-to-day contact, although the court did mention that as one of several criteria to consider in determining whether there was a significant bond. The court properly evaluated the existence of a significant relationship, needed to establish the exception; the isolated reference to day-to-day contact was simply the court's attempt to describe a significant relationship as one based on frequent contact in a parental role, rather than just having a visit and playing with your children.

We do note that prior to determining whether the exception applied, the court erroneously explained the quantum of proof needed to establish the exception, after it found that the children are likely to be adopted. The court stated that, "the burden then shifts to the party claiming that the termination would be detrimental and that the burden is on them by clear and convincing evidence to prove to this court that one of the exceptions applies." This is an incorrect statement. A parent must make the requisite showing by a preponderance of the evidence. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1007.) In this respect, the court incorrectly described the burden of proof. However, this fact does not compel a reversal.

Even under the correct standard, mother did not present a preponderance of the evidence that her children would benefit from maintaining the parent-child relationship as

we will explain more fully in the next section, because she did not present any evidence. Despite the court's misstatement, the court did not make its determination based on lack of "day-to-day" contact, or based on the lack of a primary attachment.

2. **There Is Substantial Evidence to Support the Juvenile Court's Finding that the Beneficial Parent-Child Relationship Exception Did Not Apply.**

Mother argues that the court's finding that the beneficial parent-child exception did not apply is unsupported by the record. We disagree.

It is well settled that when reunification efforts have failed, adoption is the Legislature's first choice because it gives the child the best chance at a full emotional commitment from a responsible caretaker. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) To overcome the preference for adoption and to avoid termination of parental rights, it is the parent who has the burden of showing both regular visitation and contact and the benefit to the child in maintaining the parent-child relationship. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) This requires the parent to prove that severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed. (*Ibid.*)

In deciding whether the exception applies, the juvenile court must balance the strength and quality of the natural parent-child relationship against the security and sense of belonging a new family would confer. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) Because mother contends there was inadequate evidentiary support for the court's determination that the adoptability exception did not apply, we apply the substantial

evidence standard of review. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. (*In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1333.)

Mother did not present any testimony or other evidence regarding the nature and quality of the parent-child relationship at the selection and implementation hearing. She relied instead on the information in the DPSS reports submitted by respondent. These reports indicate that in February 2008, after the supplemental petition was filed due to the new criminal charges, J.C. appeared to be quite bonded to mother at visits, although S.C. had to be encouraged to interact with mother. From March 2008 onward, the visits are described as “good” or “appropriate”, but there is no indication that either child had a significant relationship with mother, or that severing that relationship would be detrimental to them.

In weighing the evidence presented, the court looked at the ages of the children, the percentages of the children’s lives that were spent living with the parent, the positive and negative aspects of the interaction between the parent, and the children’s specific characteristics and needs. The court concluded the children had been out of the family home since February 2007, except for the four-month period when they were returned home, so they had not spent a significant percentage of their lives with their parents. The court also looked at the children’s young age. It concluded that notwithstanding the evidence presented in the reports, the parents had not met their burden. The record supports this conclusion.

In addition, we cannot ignore the fact that mother was charged with the sale of controlled substances and child endangerment after she had regained custody of her children. These criminal actions, in complete disregard for the children's welfare after winning their return to her custody, speak louder than words as to whether maintaining the parent-child relationship would be beneficial to the children.

Mother did not meet her burden of proving the existence of a beneficial parent-child relationship by a preponderance of the evidence. The trial court's finding that the beneficial parent-child relationship exception did not apply is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/King
J.